Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Expedited Declaratory Ruling	)	
Regarding the Process for Adoption of	)	CC Docket No. 00-45
Agreements Pursuant to Section 252(i) of	)	
the Communications Act and Section 51.809	)	
of the Commission's Rules	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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April 11, 2000

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REPLY OF SBC COMMUNICATIONS, INC.

I. INTRODUCTION AND SUMMARY

SBC Communications, Inc. (SBC) respectfully submits the following Reply to comments filed in the above-captioned proceeding. In this proceeding, MCI WorldCom (MCI) asks the Commission to establish by declaratory ruling uniform national section 252(i) adoption procedures. MCI claims that its proposed uniform national rules are necessary because the section 252(i) procedures put into place by some states are "an inherent deterrent to healthy competition."[1]

In its comments, SBC noted that section 252(i) has played – and will continue to play - a key role in SBC's national-local strategy and that SBC thus has a vested interest in ensuring that requesting carriers are able to avail themselves of their section 252(i) rights without unnecessary and unreasonable delay. Nevertheless, SBC expressed its strong opposition to the declaratory ruling sought by MCI on both legal and policy grounds.

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[1] MCI Petition at 10.

First, SBC noted that MCI's proposed declaratory ruling would run roughshod over the Administrative Procedure Act. The Administrative Procedure Act requires that certain procedures be followed before the Commission adopts new rules or changes its existing rules. The Commission cannot dispense with these procedures by couching what is in reality a new rule or rule change as a declaratory ruling. Yet in at least three respects, that is exactly what MCI asks the Commission to do:

- MCI asks the Commission to find that a notice of adoption must be given *immediate* effect, but the Commission's rules do not so provide; they require that adoptions be effected *expeditiously* and *without unreasonable delay.*

- MCI asks the Commission to rule that states may establish only ministerial rules relating to the *filing* of adopted agreements, but the *Local Competition Order*[2] specifically directs the states to establish procedures for handling all facets of adoption requests on an expedited basis.

- MCI asks the Commission to hold that there are only three grounds on which a section 252(i) request may be rejected, but section 51.809(c) of the Commission's rules specifically recognizes a fourth defense.

Second, SBC noted that MCI's proposed declaratory ruling would flout the basic framework of sections 251 and 252 of the 1996 Act. Indeed, it would do so in at least two separate respects:

- MCI's proposal that unilateral notices of adoption be given immediate effect cannot be reconciled with the statutorily prescribed vehicle for effecting interconnection rights and obligations: interconnection agreements.

- MCI's claim that states may not review interconnection agreements that incorporate adopted terms and conditions ignores the role specifically accorded the states under section 252(e).

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[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15449 (1996) (*Local Competition Order).*

Third, SBC noted that MCI's proposed declaratory ruling wrongly assumes that carriers may adopt all of the terms and conditions of any previously approved interconnection agreement. If Congress had intended that carriers be permitted to adopt all of the terms of another interconnection agreement, section 252(i) would have so provided. It does not. It states instead that "[a] local exchange carrier shall make available any interconnection, service, or network element provided ... to any other requesting telecommunications carrier[.]"

Fourth, SBC noted that MCI's proposal is unworkable. Legal issues aside, a notice of adoption could not possibly be given immediate effect because there is always *some* negotiation that must take place. The need for negotiation is most obvious when a carrier seeks to couple adopted provisions with newly negotiated provisions or when a carrier seeks to "pick and choose" provisions from multiple interconnection agreements. In the latter context, the parties must decide, for example, which provisions in each agreement are legitimately related to the adopted terms. They may also have to address such issues as which termination date applies.

But the need for negotiation is not limited to these two contexts. Even if a carrier purports (and is permitted) to adopt an entire agreement, some modifications to the adopted terms are virtually always required in order to adapt those terms to the new context in which they would apply. These modifications may be as routine as changes of name and address and notice instructions, or they may include such matters as changes in the points and dates of interconnection. The point is that there is rarely any such thing as a "pure" adoption.

Most of these arguments were echoed by other commenters. For example, several state commissions point out that MCI improperly asks the Commission to adopt new rules under the guise of a declaratory ruling.[3]

Likewise, several parties note that MCI's proposal is inconsistent with fundamental tenets of sections 251 and 252 of the 1996 Act. For example, Bell Atlantic stresses that a notice of adoption, in and of itself "would not establish a legally-binding contractual arrangement between the requesting carrier and the local exchange carrier, which is required by both Section 252 of the Act and state law."[4] Moreover, no less than five state commissions point out that MCI's proposal would deny the states the authority accorded to them under section 252(e) of the 1996 Act to review and approve interconnection agreements. As the Wisconsin Commission notes:

> Notwithstanding MCI's assertions, the proposed 'notice of adoption' process is not within the plain language of § 252. Given that §252 is a procedural statute, Congress would have clearly authorized creation of an adoption process for §252(i) if it had thought one necessary. MCI's proposed preemption of state approval procedures as to § 252(i) 'adoptions' is therefore unwarranted in law, especially in light of §§ 252(e)(5) and 601(c)(1) of the Act, and is unnecessary as a matter of policy.[5]

And as the Kansas Commission states:

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[3] As the Public Service Commission of Wisconsin notes, "[a] declaratory ruling is not authorized for what is essentially a request for a rule." Wisconsin Comments at 1. *See also* Oklahoma Corporation Commission Comments at 3 ("'Without unreasonable delay' does not contemplate immediate unilateral adoption."); State Corporation Commission of the State of Kansas Comments at 3 ("Contrary to the arguments presented in MCI WorldCom's petition, the Federal Act, Rules, and prior FCC orders do not prevent the KCC from adopting procedures for approval of an adopted agreement.") *And see* BellSouth Comments at 2 ("Despite styling its petition as a declaratory ruling, the purpose of MCI's petition is unrelated to terminating a controversy or removing uncertainty. ...[T]he relief actually requested by MCI is nothing short of a promulgation of new rules of general applicability.")

[4] Bell Atlantic Comments at 2.

[5] Wisconsin Commission Comments at 3.

> It does not make sense that sate commissions which are responsible for enforcement of agreements and for resolving disputes that arise in connection with interconnection agreements should not also have the authority to put in place procedures for approving and administering [section 252(i)] elections. The FCC's role with respect to interconnection agreements is limited to acting if state commissions fail to act.[6]

These state commissions also recognize that MCI's proposal would be unworkable. As Oklahoma notes, if a notice of adoption were given immediate effect, an ILEC could find itself in violation of the agreement before it has a reasonable opportunity to provision the terms required by that agreement. Such a result would be "contrary to principles of due process and simple fair play."[7] And, as the Wisconsin Commission emphasizes, an adoption could not possibly be given immediate effect because *every* adoption requires *some* negotiation:

> It may not be a complicated or lengthy process to adopt a prior agreement entered into by an ILEC, with some changes in a few particular identity provisions, such as party name, address, billing,

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[6] Kansas Commission Comments at 3-4. *See also* Telecommunications Regulatory Board of Puerto Rico (Puerto Rico Commission) Comments at 3-4:

> The Board strongly disagrees with MCIW's characterizations of state authority as 'ministerial' or 'custodial' in connection with interconnection agreements. The communications Act entrusts state commissions with the job of approving interconnection agreements. The Supreme Court, in upholding the Commission's authority to implement certain provisions of the Act, recognized that 'the 1996 Act entrusts state commissions with the job of approving interconnection agreements,' while not precluding the FCC from issuing 'rules to guide the state commission judgments.' However, when that guidance effectively usurps a state's authority to approve or disapprove an agreement, it goes beyond the proper role that Congress sought to have the FCC play.

And see Oklahoma Commission Comments at 4-5 (adoption requests are subject to state approval under section 252(e)); New York State Department of Public Service Comments at 2 (arguing that states have a statutory right to review agreements created by mixing and matching provisions of other agreements).

[7] Oklahoma Commission Comments at 5.

> information, and notice provisions. Nonetheless, the requestor's demand does require a minimum form of 'negotiation' with the ILEC. The point of the ILEC duty in § 252(i) is to explicitly shorten that negotiation by making previously-approved terms available without further contest.[8]

Any one of these flaws, by itself, warrants denial of MCI's petition. Collectively, they leave no room for doubt.

The CLEC commenters nevertheless support MCI's petition. They do not offer any new arguments, nor do they attempt to reconcile MCI's proposal with the Commission's rules, the *Local Competition Order,* the language of section 252(i), or the regulatory framework established in sections 251 and 252. Rather, they serve up their usual dose of overblown anti-ILEC rhetoric and couple it with a reiteration of MCI's flawed arguments.

SBC's comments addressed virtually all of these arguments, and SBC will not further repeat those arguments here. Nevertheless, some of these comments require a response or an elaboration on SBC's previous comments, which SBC provides below.

II. THE RECORD DOES NOT DEMONSTRATE ANY NEED FOR PREEMPTIVE ACTION BY THE COMMISSION.

In its comments, SBC agreed with MCI that different states have implemented somewhat different section 252(i) procedures, but expressed skepticism as to whether these differences are market-affecting. It noted that, while MCI claims that it "has experienced significant delay in the adoption process when seeking to exercise its rights

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[8] Wisconsin Commission Comments at 8.

under section 252(i),"[9] MCI provides no credible evidence to support this claim. It noted that the only "evidence" MCI offers are the delays that attended its April 21, 1999, notices of adoption, which are the subject of MCI's pending complaint against Ameritech. As SBC pointed out, however, in those situations, the delays resulted, not from unreasonable state procedures, but from MCI's decision to challenge, rather than follow, those procedures.[10]

The comments have only fueled SBC's skepticism as to the need for FCC action. Presumably, if the section 252(i) process were as dysfunctional as some of the rhetoric in the record suggests, CLECs would have presented substantial evidence to back up this rhetoric. They do not. At best, they offer only a few, isolated anecdotes, most of which involve disputes over the ability of CLECs to use section 252(i) to obtain reciprocal compensation for Internet traffic[11] or which grossly misrepresent the facts.[12] These few anecdotes, mainly involving

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9 MCI Petition at note 4.

10 MCI's challenge was not based on a claim that the procedures caused unreasonable delay; rather, MCI alleged there – as here – that, as a matter of federal law, a notice of adoption must be given immediate effect, irrespective of any state requirements to the contrary. *See* MCI Complaint, E-99-23.

11 *See, e.g.,* CompTel Comments (referencing and attaching IURC decision rejecting Ameritech's attempt to clarify that the adopted agreement did not contemplate reciprocal compensation for Internet traffic); Advanced Telecom Group *et al.* Comments at 10-11 (referencing Ameritech attempt to clarify that its agreements do not require reciprocal compensation for ISP traffic); AT&T Comments at Attachments A and B; Global NAPs and Universal Telecom Comments at 5-6.

12 For example, Broadspan Communications d/b/a PNC claims that Southwestern Bell Telephone Company (SWBT) recently took three months to provide PNC with a copy of an agreement PNC had intended to adopt. Here are the real facts. On October 19, 1999, PNC stated its intent to adopt the provisions of an Alltel/SWBT Arkansas interconnection agreement with certain added collocation terms. On October 28, SWBT sent PNC a list of the related terms that would be incorporated into the agreement. *See* Attachment A. On November 19, a PNC representative contacted SWBT, claiming she had not received SWBT's October 28 response.

reciprocal compensation disputes - one of the most hotly contested issues of the past few years - hardly suggest a systemic problem. Indeed, given that hundreds, if not thousands, of section 252(i) adoptions that have been implemented in the past four years, it would seem that there is no significant problem – certainly none that the states themselves cannot address within the context of existing rules.

If the Commission nevertheless concludes that the lack of uniformity among the states in addressing section 252(i) adoptions requires federal intervention, the Commission must ensure that its actions are consistent both procedurally and substantively with the law. One possibility would be to adopt the guidelines SBC proposed in its comments. Another would be to incorporate those guidelines into new rules. The Commission may not, however, adopt new rules under the guise of a declaratory ruling, particularly rules that are inconsistent with the basic tenets of sections 251 and 252, including section 252(i) itself.

III. MCI'S PROPOSAL IS AT ODDS WITH THE STATUTORY REGIME AND BASIC CONTRACT LAW.

In supporting MCI's claim that a notice of adoption should take immediate effect, AT&T claims that "[u]nder the plain terms of the Act, a § 252(i) notification should

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Accordingly, SWBT re-sent that information. Shortly thereafter, PNC decided that it wanted to change its request. Specifically, instead of adopting provisions relating to unbundled conditioned loops and DSL cross-connects in the AllTel agreement, it stated its desire to incorporate DSL-related terms that it was then negotiating with SWBT in Missouri. Those negotiations were ongoing at the time. On December 21, a dispute arose as to whether PNC would be permitted to adopt, not only the DSL terms and conditions being negotiated in Missouri, but also the rates. SWBT informed PNC that it would permit PNC to adopt the Missouri DSL terms and conditions, but not the Missouri rates. At that point, PNC decided to adopt the Alltel and Advanced Solutions agreements.

generally be self-executing[.]"[13] It bases this argument entirely on the fact that section 252(i) states that an incumbent LEC "shall" make available any interconnection, service, or network element.

This argument is frivolous. Sections 251 and 252 establish all kinds of substantive obligations. Section 251(b), for example, imposes certain "duties" on all LECs. Likewise, section 251(c) imposes additional duties on incumbent LECs. None of these duties are optional; they all could have been framed by the word "shall." Nevertheless, the rights and obligations established by section 251 are *not* self-executing. Rather, as held in *Goldwasser v. Ameritech*,[14] they are conferred through interconnection agreements.

Parties supporting MCI nevertheless seem to suggest that the execution of a new interconnection agreement is an inconvenient formality that should not be required. They suggest that, instead of executing their own agreement, the parties should be deemed to be bound by the terms of the adopted contract. This argument is a non-starter because carriers do not have a right to adopt an *entire* agreement, and the statute, in any event, *requires* that the parties execute their own interconnection agreement. But even apart from these dispositive flaws in their reasoning, there are significant problems with this approach. For one thing, as indicated by state public service commissions, policing and enforcing interconnection rights would be an administrative nightmare if those rights are

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[13] AT&T Comments at 6-7.

[14] 1998 SL 60878 (ND Ill. 1998) (The duties under sections 251 and 252 exist "only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition.")

not memorialized in a contract. For another, an interconnection agreement could not possibly be adopted in tact by other parties.[15]

This latter point is best illustrated by reference to MCI's attempt in April 1999 to adopt in its entirety an Ameritech Indiana/AT&T agreement – an attempt that led to its pending complaint at the Commission. The agreement that MCI sought to adopt expressly incorporated an interconnection date (in the fourth quarter of 1998) and interconnection points – all of which were, of course, designated AT&T wire centers. Thus, if MCI's notice of adoption were given immediate effect, as MCI claimed it should, Ameritech would have had a contractual obligation as of the date of that notice to provide MCI with interconnection at AT&T wire centers. In fact, Ameritech would have been in immediate breach of that obligation because the interconnection was to have been effected during the fourth quarter of 1998. The AT&T agreement also specified that all operations support systems orders would be transmitted electronically, although, at the time of MCI's purported adoption, MCI transmitted its orders manually.

CLECs argue, in effect, that these are mere administrative details that can be overlooked. A contract, however, is a binding legal document, not some vague articulation of rights and obligations that might or might not apply. The notion that an adoption can take effect before the necessary changes to the adopted terms have been made thus cannot be squared with the very essence of a contract. It is not a way to do business, and it is certainly not federally sanctioned.

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[15] *See, e.g.,* State Corporation Commission of the State of Kansas Comments at 3 (in the absence of a signed agreement, or at least some signed documentation as evidence that the parties have in fact agreed to be bound by a certain agreement, contractual rights maybe difficult to enforce).

Nor is there any public policy reason why the Commission should embrace this novel reformulation of the nature of a contract. The process of turning an interconnection request into a new interconnection agreement that accurately reflects the rights and obligations of the parties should not unreasonably delay market entry. Assuming the adoption is a true adoption, such that only ministerial changes are necessary, the necessary changes can be made in a matter of days.

IV. AGREEMENTS INCORPORATING ADOPTED TERMS ARE SUBJECT TO STATE APPROVAL.

A number of CLECs echo MCI's claim that the 1996 Act does not require state commission approval of agreements reflecting section 252(i) adoptions. These parties claim that the Act requires approval only of negotiated and arbitrated agreements, and that an agreement reflecting a section 252(i) adoption is neither. The Commission must reject this argument.

The argument that section 252(i) adoptions are not subject to state approval proceeds from two false premises: (1) that carriers adopt entire interconnection agreements when they invoke their section 252(i) rights; and (2) that section 252 specifies procedures for negotiated and arbitrated agreements but overlooks section 252(i) adoptions.

Contrary to the first premise, carriers are not entitled under section 252(i) to adopt entire interconnection agreements. Section 252(i) authorizes the adoption of specified terms of an interconnection agreement – those relating to the provision by the ILEC of interconnection, services, and network elements. Moreover, even in those cases in which this limitation has been ignored, carriers

do not actually adopt another agreement in tact. Some changes to the underlying agreement are virtually always required. And, of course, in many cases, carriers do not seek all of the terms of another agreement; rather, they avail themselves of their right to "pick and choose" terms from two or more agreements, thereby cobbling together a brand new amalgam. Fundamentally, then, the notion that an agreement incorporating adopted terms has already been approved is a fiction.

The second premise – that Congress overlooked section 252(i) adoptions – simply lacks credibility. There is no reason to believe that Congress forgot about section 252(i) adoptions, much less that, having directed the states to approve negotiated and arbitrated agreements, Congress intended to deny states the right to review section 252(i) adoptions. Rather, the only plausible interpretation of section 252 – particularly given that section 252(i) says nothing about adopting entire interconnection agreements - is that Congress viewed an agreement with adopted terms as a particular type of negotiated agreement. As the Wisconsin Commission argues:

> 'Adoption' should properly be seen [sic] an expedited form of 'negotiation' tested against standards of bad faith in Rule 51.301. A 'full agreement adoption' should have the least amount of negotiation time. Negotiation time would increase as fewer and fewer provisions are adopted without change and the character of a proposed interconnection agreement increasingly shifts from "off-the-shelf" to a custom deal.
>
> A fair reading of the term 'negotiation' would include a new competitor's request ... for adoption of any previously-approved interconnection agreement entered into by an ILEC. It may not be a complicated or lengthy process to adopt a prior agreement accepted by an ILEC, with some changes in a few particular identity provisions, such as party name, address, billing information and notice provisions. Nonetheless, the requester's demand does require a minimum form of 'negotiation' with the ILEC. The point of the ILEC duty in § 252(i) is

> to explicitly shorten that negotiation by making previously-available terms available without further contest.[16]

That being the case, the Commission cannot deny the states their statutory right to review interconnection agreements, as MCI asks. It can encourage the states to deem certain types of agreements approved when filed, but it cannot cut them out of the process. The law does not permit it.

V. CARRIERS MAY NOT ADOPT THE RECIPROCAL OR INTER-CARRIER COMPENSATION PROVISIONS OF ANOTHER INTERCONNECTION AGREMENT.

Another point that SBC wishes to re-emphasize is that carriers are not entitled under section 252(i) to adopt the reciprocal compensation or inter-carrier compensation provisions of other interconnection agreements. SBC so argued in its comments and anticipates that certain CLECs will strongly disagree in their replies. They will undoubtedly argue that, unless a carrier may adopt an entire interconnection agreement, ILECs will be able to slow down an adoption by requiring a protracted negotiation of the other terms and conditions.

There are four problems with this argument. First and foremost, it has nothing to do with the statute. Even assuming *arguendo* that these policy concerns were legitimate, the Commission is not free to rewrite the text of section 252(i). Second, the adoption of a reciprocal compensation rate that purportedly reflects another carrier's costs cannot be reconciled with section 252(d)(2), which limits a carrier to recovery of its *own* costs of

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[16] Public Service Commission of Wisconsin Comments at 8. While SBC believes that the Wisconsin Commission properly identifies how section 252(i) fits into the section 252 framework, it disagrees with the Wisconsin Commission to the extent that commission believes that a carrier may adopt terms other than those related to the provision by the ILEC of interconnection, services, or network elements.

transport and termination. In establishing section 51.809(b)(1) of its rules, the Commission expressly recognized that section 252(i) should not be a vehicle for avoiding the pricing rules established by section 252(d).[17] That principle applies equally to attempts to adopt the reciprocal compensation provisions of another agreement. Third, ILECs have a clear statutory obligation to negotiate in good faith. Any foot-dragging in the negotiation process would clearly violate that obligation and could – and should – be punished accordingly. Thus the statute already provides a remedy for the alleged problem. Fourth, the lack of an agreement on transport and termination rates need not, in any event, delay the implementation of the other adopted terms of an agreement because the Commission's rules prescribe interim transport and termination rates that can take effect while the reciprocal compensation provisions are negotiated.

In fact, while CLECs will undoubtedly attempt to paint this is a local competition issue, this is an issue with one – and only one - real-world implication. It has nothing to do with local competition. It has everything to do with the ability of CLECs to continue collecting billions of dollars in reciprocal compensation for Internet traffic. Having convinced regulators to mis-read existing interconnection agreements as requiring reciprocal compensation for Internet traffic,[18] CLECs seek to perpetuate the status quo

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[17] *Local Competition Order* at ¶ 1317.

[18] Consider the following: each and every one of Ameritech's interconnection agreements provides that reciprocal compensation "is as provided under the Act;" shall be paid for "terminating local traffic;" and shall not be paid for "exchange access traffic." This Commission has held that: (1) section 251(b)(5) does not require the payment of reciprocal compensation for Internet traffic under the Act; (2) Internet traffic is not local traffic; (3) CLECs delivering Internet traffic to an ISP do not "terminate" that traffic; and (4) Internet traffic is "exchange access" traffic. Nevertheless, every state that has addressed the issue has held that Ameritech's interconnection agreements require Ameritech to pay reciprocal compensation for Internet traffic. Ameritech has been forced to make hundreds of millions of dollars in such payments each year – most, incidentally, to MCI, AT&T, and their affiliates (carriers that hardly need financing from the ILECs) .

through section 252(i). They seek to ensure that they will be able to collect reciprocal compensation long after the Commission adopts rules that are intended, at long last, to bring this boondoggle to an end, or at least, to bring it under control by reducing payments as Internet traffic explodes. That is the CLECs' agenda. They seek to tie the Commission's hands in the *Inter-Carrier Compensation* proceeding. The Commission should not be fooled by this ploy.

VI. THE COMMISSION SHOULD REJECT ATTEMPTS TO ELIMINATE SECTION 51.809(c) OR TO NARROW SECTION 51.809(b) OF ITS RULES.

While the CLECs generally endorse MCI's attempt to write section 51.809(c) out of the Commission's rules, AT&T goes even further. It asks the Commission, not only to repeal tacitly section 51.809(c),[19] but also to narrow section 51.809(b)(1). Specifically, it asks the Commission to rule that for an incumbent LEC to establish a proven cost difference that would excuse it from making a term available under section 51.809(b)(1), the incumbent must show that the costs of providing the terms to the new carrier exceed the *current* costs of providing those terms to the original party to the agreement.

This is a nonsensical reading of section 51.809(b)(1) and one that cannot be squared with the rationale underlying that rule. The Commission adopted section 51.809(b)(1) because it concluded that the pricing provisions of the Act require cost-

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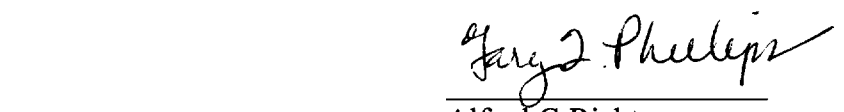
[19] The CLEC's attempt to read section 51.809(c) out of the Commission's rules could also undermine the Commission's efforts to bring some rationality to the regulatory treatment of Internet traffic. Specifically, if the Commission concludes incorrectly that the reciprocal compensation provisions are subject to adoption and simultaneously writes section 51.809(c) out of its rules, incumbent LECs could wind up paying reciprocal compensation for Internet traffic for as much as three years (the length of a typical interconnection agreement) after the Commission adopts a new inter-carrier compensation regime. That result – effectively deferring the FCC's inter-carrier compensation rules for 3 years – would wreak havoc in the marketplace, exposing incumbent LECs to billions of dollars in reciprocal compensation liabilities.

based rates. It found that, if the costs of providing a particular network element, for example, had changed, any requirement that the original rates be made available would be inconsistent with this pricing principle.[20] It does not matter, of course, that the costs of providing this element to the original party to the agreement likewise have increased. The point is section 252(i) should not become a vehicle to spread non-cost-based rates. AT&T's shameless request that the Commission mis-read section 51.809(b) must be rejected.

VII. CONCLUSION

For the reasons discussed above and in SBC's Comments, the Commission should deny MCI's Petition.

Respectfully Submitted,



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April 11, 2000

[20] *Local Competition Order* at para. 1317.

ATTACHMENT
A

Subject: FW: Broadspan MFN Alltel (AR)

-----Original Message-----
From: DONAHUE, SHARON (SWBT)
Sent: Thursday, October 28, 1999 7:59 AM
To: 'cdale@primarynetwork.com'
Cc: PHIPPS, ERROL S (LEGAL)
Subject: FW: Broadspan MFN Alltel (AR)

Broadspan Language Change Matr...

Cully,

Attached is a language change matrix that contains reservation of rights and applicability of rates, terms and conditions language, along with other language inserts, that we plan to incorporate into the Alltel Arkansas MFN that you requested. Please review it in advance of the signature ready document preparation and let me know if it is acceptable.

Thanks,

smd

LANGUAGE CHANGE MATRIX
(RECOMMENDED CHANGES FOR RED-LINING)
EXECUTIVE SUMMARY WORKSHEET

CLEC Name: Broadspan Communications, Inc.
dba Primary Network Communications

Account Manager: Jackie Dayman

Today's Date: 10/25/99

Agreement Art/Paragraph	Section Reference	Language change	Neg/A.M. Recommendation	Accepted Language	SME/Date	Comments
All Appendices		Changed ACI reference to CLEC name where appropriate.				
All Appendices		Added line to header: SWBT/BROADSPAN COMMUNICATIONS, INC. DBA PRIMARY NETWORK COMMUNICATIONS				
All Appendices	Last paragraph	Add Applicability of Other Rates, Terms and Conditions: This Appendix, and every interconnection, service and network element provided hereunder, shall be subject to all rates, terms and conditions contained in this Agreement or any other appendices or attachments to this Agreement which are legitimately related to such interconnection, service or network element; and all such rates, terms and conditions are incorporated by reference herein and as part of every interconnection, service and network element provided hereunder. Without limiting the general applicability of the foregoing, the following terms and conditions of the General Terms and Conditions are specifically agreed by the Parties to be legitimately related to, and to be applicable to, each interconnection, service and network element provided hereunder: definitions; interpretation, construction and severability; notice of changes; general responsibilities of the Parties; effective date, term and termination; fraud; deposits; billing and payment of charges; non-payment and procedures for disconnection; dispute resolution; audits; disclaimer of representations and warranties; limitation of liability; indemnification; remedies; intellectual property; publicity and use of trademarks and service marks; no license; confidentiality; intervening law; governing law; regulatory approval; changes in End User local exchange service provider selection; compliance and certification; law enforcement; no third party beneficiary; disclaimer of agency; relationship of the Parties/independent contractor;			Legal	

LANGUAGE CHANGE MATRIX
(RECOMMENDED CHANGES FOR RED-LINING)
EXECUTIVE SUMMARY WORKSHEET

Agreement Art/Paragraph	Section Reference	Language change	Neg/A.M. Recommendation	Accepted Language	SME/Date	Comments
		subcontracting; assignment; responsibility for environmental contamination; force majeure; taxes; non-waiver; network maintenance and management; signaling; transmission of traffic to third parties; customer inquiries; expenses; conflicts of interest; survival; scope of agreement; amendments and modifications; and entire agreement.				
GT&C	Table of Contents	Changed Table of Contents for Section 7. Liability and Indemnity to conform with Section Heading on page 10 to now read as: 7. Liability and Indemnification				
GT&C	Table of Contents	Added: Attachment 32: Collocation				
GT&C	1st page 3rd paragraph	Added language: **WHEREAS**, pursuant to Section 252(i) of the Federal Telecommunications Act of 1996, CLEC and SWBT have entered into an Agreement on the same terms and conditions contained in the SWBT/Alltel, Inc. Agreement for the State of Arkansas ("the underlying Agreement").			Legal	
GT&C	1st page 4th paragraph	Added language: **WHEREAS,** by executing this MFN Agreement providing certain rates, terms and conditions, SWBT reserves all appellate rights with respect to such rates, terms and conditions and does not waive any legal arguments by executing this Agreement. It is SWBT's intent and understanding of state and federal law, that any negotiations, appeal, stay, injunction or similar proceeding which impacts the applicability of such rates, terms or conditions to the underlying Agreement will similarly and simultaneously impact the applicability of such rates, terms and conditions to CLEC. In the event that any of the rates, terms and/or conditions herein, or any of the laws or regulations that were the basis for a provision of the Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory bodies or courts of			Legal	

Agreement Art/Paragraph	Section Reference	Language change	Neg/A.M. Recommendation	Accepted Language	SME/Date	Comments
		competent jurisdiction, including but not limited to any decision by the Eighth Circuit relating to any of the costing/pricing rules adopted by the FCC in its First Report and Order, *In re: Implementation of the Local Competition Provisions of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), (e.g., Section 51.501, et seq.), upon review and remand from the United States Supreme Court, in *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999) or *Ameritech v. FCC*, No. 98-1381, 1999 WL 116994, 1999 Lexis 3671 (June 1, 1999), ("such Actions"), the Parties shall immediately incorporate changes from the underlying Agreement, made as a result of such Actions into this Agreement. Where revised language is not immediately available, the Parties shall expend diligent efforts to incorporate the results of such Actions into this Agreement on an interim basis, but shall conform this Agreement to the underlying Agreement, once such changes are filed with the Commission.				
GT&C	Section 4.0	Changed Term of Agreement (hard coded termination date): ~~The initial term of this Agreement shall be three years (the "Term") which shall commence on the Effective Date.~~ **This Agreement shall expire on June 23, 2002.**			Errol Phipps	
GT&C	Section 6.1	Changed Confidentiality and Proprietary Information (added CLEC NDA date): For the purposes of this Agreement, "Confidential Information" means confidential or proprietary technical or business information given by the Discloser to the Recipient. All information which is disclosed by one party to the other in connection with this Agreement, during negotiations and the term of this Agreement, will automatically be deemed proprietary to the Discloser and				

LANGUAGE CHANGE MATRIX
(RECOMMENDED CHANGES FOR RED-LINING)
EXECUTIVE SUMMARY WORKSHEET

Agreement Art/Paragraph	Section Reference	Language change	Neg/A.M. Recommendation	Accepted Language	SME/Date	Comments
		subject to this Agreement, unless otherwise confirmed in writing by the Discloser.				
GT&C	Section 58.1	~~Ancillary Functions may include, but are not limited to Collocation. Those ancillary functions associated with Poles, Conduits and Rights-of-Way are covered in a separate agreement between the Parties, executed on October 20, 1998.~~ **SWBT agrees to provide Ancillary Functions to CLEC as set forth in Attachment 13: Ancillary Functions.**			Errol Phipps	
GT&C	Signature Page 1st paragraph	Added language: The Parties acknowledge that on January 25, 1999, the United States Supreme Court issued its opinion in *AT&T Corp. v. Iowa Utilities Bd.,* 119 S. Ct. 721 (1999) and on June 1, 1999 issued its opinion in *Ameritech v. FCC*, No. 98-1381, 1999 WL 116994, 1999 Lexis 3671 (June 1, 1999). By executing this MFN Agreement, and providing certain UNEs and UNE combinations (to the extent provided for under such Agreement), is SWBT does not waive any of its rights, remedies or arguments with respect to such decisions, including its right to seek a modification to the underlying Agreement and this Agreement under the intervening law clause or other provisions of this Agreement to reflect the fact that is SWBT's obligation to provision UNEs identified in this Agreement is subject to the provisions of the federal Act, including but not limited to, Section 251(d), including any legally binding interpretation of those requirements that may be rendered by the FCC, state regulatory agency or court of competent jurisdiction. SWBT further reserves the right to dispute whether any UNEs identified in the Agreement must be provided under Section 251(c)(3) and Section 251(d) of the Act, and under this Agreement.			Legal	
GT&C	Signature Page 2nd paragraph	Added language: ~~This Agreement, entered into pursuant to Section 252(i) of the Telecommunications Act, is based on an approved contract previously entered into by SWBT and Alltel~~			Legal Language removed per Larry Cooper	

LANGUAGE CHANGE MATRIX
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Agreement Art/Paragraph	Section Reference	Language change	Neg/A.M. Recommendation	Accepted Language	SME/Date	Comments
		~~Communications, Inc. There was no meeting of the minds of those original parties that Internet traffic would be subject to reciprocal compensation as Local Traffic under that contract. The FCC has repeatedly asserted its interstate jurisdiction over Internet traffic, including as recently as in its Declaratory Ruling in CC Docket 96-98, released February 26, 1999, in which the FCC expressly confirmed that Internet bound traffic is non-local interstate traffic. For this reason, SWBT does not believe this Agreement provides local reciprocal compensation for Internet traffic and fully reserves its rights on this issue, including the right to invoke the dispute resolution or other lawful procedures to challenge any contention by any other party to the contrary.~~			10/13/99	
Att. 1 Resale	Exhibits A & B	Hard copy inserted into agreement – electronic files not available				
Att. 11 ITR	Scenarios 1 – 7	Hard copy inserted into agreement – electronic files not available				
Att. 32 Collocation		Added Generic MOKA Collocation Appendix				
All appropriate appendices	Notices Section	Changed CLEC notice information: Susan Butler Vice President - Operations Broadspan Communications, Inc. dba Primary Network Communications 11756 Borman Dr., Suite 101 St. Louis, MO 63146-4133				
All appropriate appendices	Notices Section	Changed SWBT notice information: Contract Management Southwestern Bell Telephone Company Four Bell Plaza, 9th Floor 311 S. Akard Dallas, TX 75202-5398				

CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of **SBC's Reply Comments** has been served on the parties attached via postage-prepaid on this 11th day of April 2000.

By: Anisa A. Latif
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